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Enforcing a Holding Deposit Agreement

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Landlords who use holding deposits as leverage for varying agreed terms against a prospective tenant's interests breach contract. Victims of such a breach can have recourse to the County Court to protect their interests. This article draws on the writer's experience as a tenant enforcing the terms of a holding deposit agreement against a repudiating landlord to offer lessons for tenants and landlords who wish to avoid a similar predicament.

Prospective tenants in England are often asked to put down a holding deposit as a condition of signing a tenancy agreement. A holding deposit is an up-front payment given to the landlord or the landlord's agent to place a "hold" on the property from being rented to anyone else while the applicant's references are checked. It is paid after the key terms of the tenancy (for example, the rent amount and move-in date) have been agreed. Its purpose is to give both parties peace-of-mind that the applicant is "locked in" to renting the property.

In a previous contribution to the *Review* (see, S. Beswick, "Holding Deposit Agreements: Pre-tenancy Obligations and Rights" (2015) 19 L. & T. Rev. 143), I described how the payment of a holding deposit is improperly used by some landlords as leverage for "renegotiating" the terms of the tenancy prior to handing over the keys. The inspiration for that article came from my own experience as a tenant and from discussions with fellow lawyers living in London. Last year, I put my rent where my mouth was: I sued my former landlord. For the benefit of tenants and landlords who find themselves in a similar predicament, I offer some brief reflections on my experience.

Background

I found my East London apartment through an online letting service in April 2015. After a viewing with the landlord's letting agent, and upon negotiating the basic terms as to the rent, fees, move-in date, and tenancy length (the agent relaying to/from the landlord), I paid over a holding deposit of £500 at the agent's request. The agreed terms were recorded in a one-page "Proposal to Let". That document also recorded (1) that upon acceptance of the deposit the landlord/agent agreed to stop advertising the property as available; (2) that there was no right of refund of the deposit should the prospective tenant back out of the tenancy; and (3) that the one-page holding deposit agreement was "not a tenancy agreement". I then cancelled other viewing appointments and ceased house-hunting.

In the days following, I learned that advertisements of the property had not been taken down, that the landlord had in fact engaged multiple agents to let the same property, and that if I wanted to preserve the privilege of signing the tenancy agreement, I would need to match a higher rental

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offer made by another prospective tenant. My protests and reliance on the agreed Proposal to Let were to no avail. In the end, having passed the requisite reference and credit checks, I was presented with a redrafted tenancy agreement which rewrote—to the benefit of the landlord—all of the terms that had originally been agreed. I signed, reluctantly, reiterating my protest.

In the ensuing months, I paid rent and various fees, on time and at the higher (renegotiated) rates, and generally maintained a positive and uneventful relationship with the landlord. The additional "fees" I paid under protest. On several occasions, I raised the issue of the "renegotiation" being in breach of our holding deposit agreement, each time to no avail. At the end of my tenure in London, I vacated the apartment without discord and received my security deposit back in full. I then mailed my former landlord a pre-action letter, setting out my claim for a refund of the overpayments over the course of the tenancy.

The claim

The claim was for breach of contract. My contention was that payment of the £500 holding deposit on terms that had been agreed verbally and recorded in the one-page Proposal to Let formed an enforceable contract. The contract was a holding deposit agreement: an agreement for lease that grants a prospective tenant the right (as well as the obligation) to enter into the proposed tenancy on the agreed terms provided the conditions as to passing reference checks are met.

This agreement had been breached when the landlord attempted to "renegotiate" the terms. Specifically, the landlord's failure to cease marketing the apartment, and the attempts to raise the monthly rent rate, to move forward the tenancy commencement date, and to charge various additional fees, were repudiatory breaches of the landlord's obligations under the holding deposit agreement. I sought repayment of the difference between what had been agreed in the Proposal to Let, and what had ultimately been paid over the course of the tenancy. No consideration had been exchanged for the one-sided "variations" introduced into the tenancy agreement. In the circumstances, continuing with the rental of the apartment at the higher rates and claiming back the difference later appeared to be the most practical way to mitigate losses.

The response was, perhaps, not surprising. The landlord averred that the Proposal to Let document was not a legally binding contract; that it was, at most, an agreement between the prospective tenants and the agent only; and that, in any event, the terms of the tenancy agreement overrode those of the holding deposit agreement. (The landlord also suggested that, at the relevant times, the agent had been acting on behalf of the *tenants*, despite having been formally retained by the landlord.)

Upon reaching this stalemate, I filed proceedings in the County Court Money Claims Centre (Claim No.D19YM491, 5 July 2017). The aim was to test the arguments and to attain a precedent on the enforceability of residential holding deposit agreements.

Result

That aim was not quite realised. Instead, the landlord admitted the claim in full. Within a month of filing the claim, the landlord agreed to refund the overpaid portion of the rent and fees in their entirety, along with interest (at the County Courts Act 1984 rate of 8%), and the filing fee.

Take-home points for tenants

What was heartening about this result was how quickly the imbalance in bargaining power shifted once a claim was filed in court. Despite having a background in litigation, I had no effective

bargaining power during the pre-tenancy period. My options upon being presented with the "renegotiated" terms were either to accede to the landlord's demands and take the apartment on less favourable terms, or to walk away and resume house-hunting (while seeking the return of the deposit).

This is a common predicament. At minimum, it is a frustrating and wasteful experience. For vulnerable renters—those who have no back-up accommodation options, or who cannot afford to part with more than one deposit—it can be devastating. Holding deposits are the gateway to the residential rental market. Most landlords and agents in the cities require payment of a holding deposit before they will lease a property. But unlike security deposits, holding deposits are not yet formally regulated.

In recent years, a number of consumer watchdogs, including Which?, Shelter, Generation Rent, and Citizens Advice, as well as the Property Ombudsman, have sought to improve visibility and understanding of holding deposits to counter exploitative practices. Yet, most appear to advise that, in the event of a breakdown in agreement, the best a prospective tenant can hope for is a refund of the deposit. That is poor advice.

What a prospective tenant should expect is what any person who suffers a breach of contract is entitled to: recourse to English contract law (see, S. Beswick, "Holding Deposit Agreements: Pre-tenancy Obligations and Rights" (2015) 19 L. & T. Rev. 143). A tenant who acts in reliance on a repudiated holding deposit agreement often risks more than just the deposit. In such circumstances, a bare refund may not be an adequate remedy. While each case will depend on its own facts, tenants in this predicament should:

- inform the landlord and the agent that a holding deposit agreement is an enforceable contract, and protest attempts to "renegotiate" agreed terms;
- keep a record of communications;
- consider contacting one of the consumer advocates listed above for assistance; and
- if necessary, take advice and consider filing a money claim in the County Court for breach of the holding deposit agreement. For a non-lawyer, this can be less daunting than it might first appear. The process is streamlined, it can be initiated online (see, Money Claim Online, *https://www.gov.uk/make-money-claim*), and the fees are relatively modest (and subject to reimbursement).

Engaging in disputes over one's living circumstances can be unnerving. But sometimes dogged reliance on one's rights is warranted to avert exploitative practices.

For landlords

Most landlords simply want reliable tenants and an uneventful tenancy. Where trouble can arise is when self-managed landlords looking to rent out an investment property fail to understand or to take seriously their role. A landlord who gives a letting agent broad leeway to engage and contract with prospective tenants on his or her behalf should not think that they are free to change their mind if a better deal later comes along.

Any landlord who believes that engaging a letting agent is equivalent to hiring a marketing assistant is mistaken. Such landlords would do better to hire a professional property manager who will take responsibility for the entire letting process. In particular:

- Landlords should know that their letting agent has legal authority to act for them, and they should understand the scope of that authority. Though it is trite law, it is

surprising how often people (including letting agents) do not appreciate that the agent represents the landlord's interests, not the tenant's: see, Property Ombudsman, *Guidance for Consumers: Landlords (TPOE10-1) and Tenants (TPOE14-1)*.

- Landlords should not make (or let agents make on their behalf) agreements with multiple applicants in respect of the same property with a view to a competitive tenant "vetting process". While it is quite acceptable to advertise on a range of marketing portals, it is prudent to have a single point of contact—either *an* agent, or the landlord. Otherwise, the landlord risks contracting with competing tenancy applicants and being in breach of contract with each.
- All parties should better understand the implications of agreeing to and paying a holding deposit. Negotiations over the proposed tenancy's key terms should take place and be settled before any transfer of money. Once the deposit is accepted, contractual obligations stick.

The lesson for landlords is not that they should stop the practice of requiring holding deposits from prospective tenants. Nor should landlords want to use clever drafting language to gut the legal effect of holding deposit agreements. A deposit request that secures nothing would be a red flag to tenancy applicants. Pre-tenancy contracts can work to the benefit of both landlords and tenants: reassuring the prospective tenant that the property will be held for them and reassuring the landlord that the tenancy candidate will not back out of signing the lease on the agreed terms. But this net benefit only holds if both parties treat the terms of the holding deposit agreement seriously.

Tenant Fees Bill

There have been recent developments in this area of law. On 2 May 2018, the Government introduced into the House a bill to ban letting fees and to better regulate both holding deposits and security deposits: see Tenant Fees Bill 2017-19. See also, T. Pilgrim, "New Year—New Challenges for Real Estate in 2018 and Beyond" (2018) 22 L. & T. Rev. 1. Cf, Rent (Scotland) Act 1984 s.82 (which proscribes holding deposits in Scotland).

Under the Bill, holding deposits are to be capped at one week's rent (Sch.1 cl.3(3)). In the event that a tenancy is not commenced, the Bill provides that the landlord must repay the holding deposit within seven days, unless the tenancy failure is the fault of the prospective tenant (Sch.2). Aggrieved tenancy applicants will have recourse to the First-tier Tribunal (Property Chamber), whose orders will be enforceable by the County Court (cl.15).

The Bill does not provide an exhaustive regime over holding deposits; it simply sets down minimum obligations on landlords for their treatment. Accordingly, the Bill aims to supplement, but not supplant, the law of contract that governs pre-tenancy agreements. That is a sound approach.

Conclusion

A holding deposit agreement is not a tenancy agreement. It is an agreement for lease. Regardless of when the Tenant Fees Bill becomes law, recourse to the courts is already (and will remain) available to serve aggrieved persons who paid a holding deposit on agreed terms.

The law is stated as at 2 May 2018.